Perwira Affin Bank Bhd v KI Production Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2(S5)–24–1305 OF 1998
KAMALANATHAN RATNAM J
13 JUNE 2000

Civil Procedure *— Stay of proceedings — Stay pending appeal — Appeal against order for sale — Whether land has special value of loss which may not be adequately compensated by damages*

The plaintiff obtained an order for sale of two parcels of land by auction to recover sums due under facilities granted to the defendant. The defendant filed an appeal against the order for sale and applied for a stay of all proceedings pending the disposal of its appeal to the Court of Appeal. It was submitted that the special circumstances particular to this case was that since land has a special value, it would render nugatory the decision of the Court of Appeal if a stay was not granted.

Held, allowing the application:

Land has a special value of loss which may not be adequately compensated by damages and it is a matter that ought to be considered in all matters including foreclosure proceedings. On this ground, the court was convinced that the defendant's application ought to be seriously considered by the court. Further, the court was satisfied that the defendant had raised an issue that requires a stay to be granted until determination of the appeal (see pp 654F–G, 656I–656A).

[Bahasa Malaysia summary

Plaintif telah memperolehi satu perintah untuk penjualan dua bidang tanah melalui perlelongan bagi memperolehi semula jumlah yang kena dibayar di bawah kemudahan-kemudahan yang diberikan kepada defendan. Defendan telah memfailkan satu rayuan terhadap perintah untuk jualan tersebut dan memohon untuk suatu penggantungan akan semua prosiding sementara menantikan pelupusan rayuannya kepada Mahkamah Rayuan. Adalah dihujahkan bahawa keadaan-keadaan khas yang khusus bagi kes ini adalah bahawa oleh kerana tanah tersebut mempunyai nilai khas, ia akan menjadikan keputusan Mahkamah rayuan sia-sia jika suatu penggantungan tidak diberikan.

Diputuskan, membenarkan rayuan tersebut:

Tanah tersebut mempunyai nilai kerugian khas yang mana tidak boleh diberikan pampasan melalui gantirugi dengan secukupnya dan ini

merupakan satu perkara yang harus dipertimbangkan dalam semua hal termasuk prosiding halangtebus. Atas alasan ini, mahkamah yakin bahawa permohonan defendan haruslah dipertimbangkan secara serius oleh mahkamah. Selanjutnya, mahkamah berpuashati bahawa defendan telah membangkitkan satu isu yang memerlukan satu penggantungan diberikan sehingga penentuan rayuan tersebut (lihat ms 654F–G, 656I–656A).]

Notes

For cases on stay pending appeal, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4319–4320.

Cases referred to

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)
Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105 (refd)
Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633 (refd)
Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 (refd)

Legislation referred to

National Land Code 1965 ss 256(3), 340

Karen Kaur Bal (*BC Teh & Yeoh*) for the appellant/defendant.
Phua Jin Key (*Manjit Singh Sachdev Mohammad Radzi & Partners*) for the respondent/plaintiff.

Kamalanathan Ratnam J:

The application

This is the defendant's application for a stay of all proceedings pending the disposal of the defendant's appeal to the Court of Appeal against the decision of this court given on 3 August 1999 granting an order for sale.

Facts

On 16 December 98 the plaintiff had filed an application for an order for sale of two parcels of land known as HS (D) 9574 Lot No 31877 and HS (D) 9575 Lot No 31878 ('the said lands') by auction to recover sums due under four facilities, namely, the overdraft, a second overdraft, a bank guarantee and a term loan. On 3 August 1999, my learned brother James Foong J granted the order for sale and on 27 August 1999 the defendant filed an appeal against the said decision.

Findings of the court

Much has been said about the 'special circumstances' approach and the 'rendering nugatory' approach which this court ought to consider before

granting a stay of proceedings pending appeal. The Federal Court in *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 clearly laid down the law that the special circumstances approach ought to be followed. The Federal Court went on to hold at p 111 as follows:

> ... there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about. As long as one does not stray beyond the perimeter set by the judicial principles, the discretion can be exercised.

The defendant thus argued that the special circumstances particular to this case is that since land has a special value, it would render nugatory the decision of the Court of Appeal if a stay was refused. The defendant thus argued that if a stay was not granted the plaintiff would proceed with the summons for directions and obtain an auction date and the said lands would then be sold even before the appeal is heard.

In *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633 Edgar Joseph Jr SCJ (sitting as a High Court Judge) held that 'land is always deemed to have a special value of loss which may not be adequately compensated by damages'. Again, whilst this time sitting in the Federal Court the same learned judge said in *Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p 792:

> ... not forgetting that land is always deemed in law to have a special value and is in the nature of things, absolutely limited ...

Therefore there is no doubt that the Federal Court has expressed its view that land has 'a special value of loss which may not be adequately compensated by damages'. On this ground I am convinced that the defendant's application ought to be seriously considered by this court. However, the plaintiff submitted that the question of land having a special value is a matter that ought to be considered only when the court has to consider a case involving a sale and purchase agreement or when the court has to consider the issue as to whether an award of specific performance or damages would suffice. He further argued that the question of land having a special value ought not to be a factor when considering a statutory right of sale in foreclosure proceedings. This is, in my view, an inappropriate submission. That land has a special value, is a matter that ought to be considered in all matters including foreclosure proceedings.

Is there merit?

But however, the issue is not just the fact that the subject matter of this appeal relates to land. The defendant must also show that it has merits in proceeding with the appeal. In considering whether there are any merits, it is not the duty of this court to determine any issues. All I have to do is to

consider if the appellant/defendant has raised any issue showing that there is a strong possibility of success, on appeal.

In this case, by a letter of offer dated 24 November 1994 the plaintiff granted the defendant the following facilities:

(1) First overdraft of RM360,000.
(2) Second overdraft of RM400,000.
(3) Bank guarantee of RM24,300.
(4) Term loan of RM626,000.

In respect of the terms and conditions, it was agreed, inter alia, that:

(i) the defendant shall execute a first legal charge against the term loan of RM626,000; and

(ii) the defendant shall execute a second legal charge against the second overdraft of RM400,000.

In consequence thereof the defendant executed only two security documents, namely:

(i) a Form 16A together with Annexure for the term loan of RM626,000; and

(ii) another Form 16A together with annexure for the second overdraft of RM400,000.

However, the plaintiff had in its statutory notice Form 16D included a demand in respect of all four facilities. The defendant contends that this is wrong in law since there are only two charge documents and that in the circumstances the plaintiff could at best, apply for an order for sale in respect of the two charges, namely, in respect of the term loan and the second overdraft. In *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 the Federal Court held that 'cause to the contrary' within the meaning of s 256(3) of the National Land Code 1965 ('the NLC') might be established only in three categories of cases:

(i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the NLC;

(ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and

(iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

Whether the defendant will be able to successfully argue its case as falling within the third category, is for the Court of Appeal to decide. The respondent/plaintiff in its submission contends that the inclusion of the two other facilities in the statutory notice of demand, namely, the Form 16D, which two facilities are not part of the two charges, is a minor irregularity. This again is not for me to decide. In so far as this application for stay is concerned I am satisfied that the appellant/defendant has raised an issue

that requires a stay to be granted until determination of the appeal. In the exercise of my discretion, I order costs to be in the cause. A

Application allowed.

Reported by Jafisah Jaafar

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